McClatchy Newspapers, Inc. d/b/a The Fresno Bee *and* Graphic Communications International Union, Local 404, AFL–CIO. Cases 32–CA–17299 and 32–CA–17499

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On December 1, 1999, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs; the Respondent also filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions except to the extent modified below.

We agree with the judge that the Respondent was not obligated to bargain with the Union over its decisions to implement a corporatewide, computerized employee benefits system (PeopleSoft), and a new printing system (Two Parts to the Field, or TPF), because those decisions were made before the election which resulted in the certification of the Union on August 17, 1998. See *Howard Plating Industries*, 230 NLRB 178, 179 (1977).[1]

However, we do not agree with the judge that the Respondent was free unilaterally to change the employees' unpaid lunch period or shift schedules, even though these changes resulted from the postelection implementation of TPF. In the judge's view, the Respondent was required to bargain only over "the effects of these changes." However, under our established precedents, the lunch period and shift changes were themselves the discretionary "effects" of preelection decisions on terms and conditions of employment. The Respondent was consequently required to bargain over them.[2]

An employer's duty to bargain with the union representing its employees "encompasses the obligation to bargain over the following mandatory subjects—'wages, hours, and other terms and conditions of employment. . . .' That obligation includes a duty to bargain about the 'effects' on employees of a management decision that is not itself subject to the bargaining obligation." See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679–682 (1981); *NLRB v. Litton Financial Printing Division*, 893 F.2d 1128, 1133–1134 (9th Cir. 1990), revd. in part on other grounds 501 U.S. 190 (1991). Where changes in employee working conditions constitute such a bargainable effect, an employer violates Section 8(a)(5) and (1) of the Act by implementing those changes without bargaining with the union. See *Litton*, 893 F.2d at 1133–1134. *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368 (4th Cir. 1995), cert. granted on other grounds 516 U.S. 963 (1995), affd. 517 U.S. 392 (1996) (some citations omitted).

An employer violates Section 8(a)(5) when it makes a material and substantial change in wages, hours, or any other term of employment that is a mandatory subject of bargaining, at a time when the employees are represented by a union, and in the absence of an impasse in bargaining. Even where a change resulted directly from a permissible, preelection or managerial decision concerning the scope of the business, the employer is required to bargain over the change as an effect of that decision. *First National Maintenance Corp. v. NLRB*, 452 U.S. at 677 fn. 15; *Bridon Cordage*, 329 NLRB 258, 259 (1999); *Litton Financial Printing*, 286 NLRB 817, 819–821 (1987), enfd. in relevant part 893 F.2d 1128 (9th Cir. 1990), cert. denied in relevant part 498 U.S. 966 (1990). This is so because in most such situations "[t]here are alternatives that an employer and a union can explore to avoid or reduce the scope of the [change at issue] without calling into question the employer's underlying decision." *Bridon Cordage*, supra.

The General Counsel establishes a prima facie violation of Section 8(a)(5) when he shows that the employer made a material and substantial change in a term of employment without negotiating with the union. E.g., *Taino Paper Co.*, 290 NLRB 975, 977 (1988). The burden is then on the employer to show that the unilateral change was in some way privileged. E.g., *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 628 (1990); *Van Dorn Plastic Machinery Co.*, 265 NLRB 864, 865 (1982), enf. denied on other grounds 736 F.2d 343 (6th Cir. 1984). In this case, it was the Respondent's obligation to establish that the unilateral changes were the inevitable consequences of a permissible preelection or managerial decision (and consequently not subject to notice and bargaining with the Union), and, for that purpose, the employer must show not only that the change resulted directly from that decision, but also that there was no possibility of an alternative change in terms of employment that would have

[1] Because the decisions to implement both PeopleSoft and TPF were made before the election, we need not determine whether, or to what extent, either decision was a managerial decision concerning the scope of the Respondent's business and consequently not subject to the Act's notice and bargaining requirement.

[2] We agree with the judge, for the reasons stated in her decision, that the Respondent was also required to bargain with the Union over other unilateral changes that were unrelated to PeopleSoft or to TPF concerning shift selection, shift scheduling, double shifts, vacation shifts, and employee hours and days.

warranted bargaining. *Holly Farms Corp. v. NLRB*, supra, 48 F.3d at 1368.[3]

The Respondent's contention that its unilateral changes in the lunch period and shift schedules were the inevitable consequences of the implementation of TPF is based entirely on the oral and conclusory testimony of its witnesses. The judge implicitly credited these witnesses to the extent of finding that the changes did in fact result from TPF's implementation. However, neither that testimony nor the record as a whole establishes why the specific changes at issue were made inevitable by TPF and that no alternatives were possible.

It is not clear, for example, why employees who were given an additional 30 minutes for their lunchbreak, purportedly because the presses had to be down for a longer midshift interval under TPF, could not instead have been assigned during that time to perform work unrelated to operating the presses, thereby avoiding the need for an extended lunchbreak and a prolonged shift. Similarly, although there was testimony that the addition of a new shift for some employees beginning at 9 p.m. resulted from TPF, there was no showing that the new shift had to start at that particular time. Moreover, the Respondent has not even contended, let alone shown, that it was unable to give the Union advance notice that either of these changes was impending.[4]

Accordingly, we find that the changes in lunch period and shift scheduling were not inevitable consequences of TPF, but were the effects of that decision, and as such, were mandatory subjects of bargaining. See, e.g., *KIRO, Inc.*, 317 NLRB 1325 (1995) (effects of decision to alter broadcast lineup); *Kendall College of Art*, 288 NLRB 1205 (1988) (effects of expansion of curriculum).[5] This finding is reinforced by the circumstances surrounding the Respondent's elimination of double shifts. In this regard, the Respondent contends that its March 1, 1999 elimination of double shifts was directly necessitated by TPF, just as it argues that the changes in lunch period and shift scheduling were the inevitable consequences of TPF. However, it is undisputed that the Respondent unilaterally restored double shifts on May 17, 1999, without having to reverse or modify TPF, thereby demonstrating that no inextricable relationship existed between TPF and the initial change.

We also reject the Respondent's alternative contention that all the work-related changes at issue were consistent with its past practice and therefore permissible. It is clear that prior to the election resulting in the Union's certification, the Respondent made day-to-day changes in order to adjust to the day-to-day changes in its operational needs which are characteristic of its industry (e.g., shift assignments and vacation schedules). The unilateral changes we have found unlawful, however, were permanent and systemic.

We similarly reject the Respondent's contention that these unilateral changes were not material and substantial. See *Blue Circle Cement*, 319 NLRB 954, 954 (1995), enfd. in relevant part 106 F.3d 413 (10th Cir. 1997) (change in shift time); *Atlas Microfilming*, 267 NLRB 682, 695–696 (1983), enfd. 753 F.2d 313 (3d Cir. 1985) (extension of lunch period). In *La Mousse, Inc.*, 259 NLRB 37 (1981), enfd. 703 F.2d 576 (9th Cir. 1983), on which the Respondent relies in this connection, breaktimes were increased by only 5 minutes. In the most analogous change at issue here, however, the unpaid lunchbreak was doubled from half an hour to 1 hour.

For these reasons, we find that the Respondent has not established that it was privileged to implement the unilateral changes specified above. The Respondent was accordingly required to bargain with the Union over those changes.

However, we do not agree with the judge that the Respondent was obligated to bargain over the effects of a unilateral change in the Respondent's payroll period; nor do we agree with our dissenting colleague that the Respondent was required to bargain over the change in the payroll period itself. On the basis of the limited evidence in the record, we view this change and its effects as, at most, a ministerial and de minimis effect of the implementation of PeopleSoft. In the only specific instance of an alleged impact on an employee, the affected employee admitted that upon his request the Respondent restored the vacation time he might have lost as a result of the switchover to the new payroll period. To this extent, the impact was not inherent in how the new payroll period was to be administered. Another employee also stated that the change in payroll caused no reduction of work hours and seemed to be "purely for internal bookkeeping purposes." The General Counsel presented no evidence that the change affected employees after it was put in

[3] Arguably, the effect on terms of employment of any managerial decision could be said to have resulted "directly" from that decision. To find that such an effect is excused from the Act's notice and bargaining requirement, simply because it resulted directly from a nonbargainable managerial decision, would undermine the effects bargaining requirement.

[4] See *Oklahoma Fixture Co.*, 314 NLRB 958, 961 fn. 7 (1994), affd. in relevant part 79 F.3d 1030 (10th Cir. 1996) (once employer has decided to implement a change in terms of employment, time is ripe for effects bargaining); *Burk Enterprises*, 313 NLRB 1263, 1268 (1994) (failure to give union preimplementation notice of change in terms of employment is excused only where employer shows emergency).

[5] In *KIRO*, cited by the Respondent, the Board found that the employer was required to bargain over the effects of its decision to broadcast a new program, even though the managerial decision itself was not subject to bargaining. 317 NLRB at 1326–1327.

place. For these reasons, we cannot find that a "material, substantial, and significant" change in a term of employment occurred in this instance. *Peerless Food Products*, 236 NLRB 161 (1978).

We also do not agree with our dissenting colleague and the judge that the Respondent was required to bargain over a reduction in the assignment of overtime, which we also view as de minimis. The record indicates that, notwithstanding the unilateral reduction in the assignment of "replacement" overtime, overtime in the aggregate for employees in the unit—including those who testified at the hearing—increased substantially during the course of the following year. No evidence indicated that any employee lost overtime as a result of the change. We also note that the Respondent immediately rectified former Manager Fred Van Der Meulen's method of assigning overtime when it was brought to Manager Janet Owen's attention, and that Brad Cagle, the Union's president and representative at the bargaining table, testified that he was unaware of the nature of any purported change in the assignment of overtime. Again, therefore, the General Counsel has failed to establish a material and substantial change here in question. *Peerless Food*, supra.

With respect to remedy, we do not rely on *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as did the judge. *Transmarine*, which involved the closing of a terminal and resulting layoffs, mandated a minimum of 2 weeks backpay for the affected employees on the ground that an order to bargain over the effects of the shutdown would be meaningless by itself, since the union no longer had any negotiating strength. In this case, which involves no lost work opportunity, there is no basis to conclude there was an equivalent loss of bargaining strength or the need for such a make-whole remedy.

We will modify the remedy in the recommended Order to that effect.[6]

[6] The Respondent excepts to the requirement in the judge's order that the unilateral scheduling changes it made on May 17, 1999, be rescinded, pointing out that these changes merely reversed some of the changes it had made on March 1, 1999, which we have found unlawful. Because some of the Respondent's unilateral changes may be perceived as beneficial to employees, we will order the rescission of these changes only at the request of the Union. See, e.g., *CJC Holdings, Inc.*, 320 NLRB 1041, 1047 (1996), affd. 110 F.3d 794 (5th Cir. 1997); *Bellingham Frozen Foods*, 237 NLRB 1450, 1469 (1978), enfd. in relevant part 626 F.2d 674 (9th Cir. 1980). That is, the normal remedy for the unlawful changes of March 1 would be to restore the status quo ante, but to give the union the choice to retain any changes deemed beneficial. The Respondent could not avoid this remedy by engaging in its further unilateral conduct on May 17. We will also modify the judge's recommended Order in accordance with our decisions in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), and *Ferguson Electric Co.*, 335 NLRB 142 (2001).

ORDER

The National Labor Relations Board orders that the Respondent, McClatchy Newspapers, Inc. d/b/a The Fresno Bee, Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing its existing practices regarding length of lunch period; shift selection; shift schedules; double shifts; hours, days, and shift schedules of unit employees (including creating new shifts and changing shift starting times); and vacation relief, without giving prior notice to the Union and without affording the Union an opportunity to bargain with regard to such changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain in good faith with the Union over the terms and conditions of employment of its employees in the following unit appropriate for purposes of collective bargaining:

> All full-time and regular part-time pressroom employees, including but not limited to, employees in the plateroom and utility workers, employed by Respondent in its Pressroom located at 1626 E. Street, Fresno, California facility; excluding all office clerical employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act, as amended, and all other employees, including but not limited to pre-press department employees, packaging center employees, and other production employees.

(b) Rescind, at the request of the Union, the changes it made on March 1, 1999, regarding shift selection, double shifts, length of lunch periods, shift schedules (including new shifts and new shift starting times), and unit employees' scheduled hours, days, shifts, and vacation relief.

(c) Rescind, at the request of the Union, the changes it made on May 17, 1999, rescinding the changes it made on March 1, 1999.

(d) Make its affected unit employees whole for any losses they suffered as a result of the Respondent's failure to give notice or bargain with the Union regarding its changes of its existing practices regarding shift selection; shift scheduling; double shifts; unit employees' hours, days, lunch periods, shifts, or vacation relief, in the manner described in the remedy section of the judge's decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Fresno, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, dissenting in part.

My colleagues and I agree on the controlling legal principles here. We differ only with respect to factual matters related to two of the unilateral changes at issue. In my view, the Respondent could not lawfully change its payroll period or its method for assigning overtime without bargaining with the Union. Both of these changes and their effects were, in fact, material and substantial.

I. THE PAYROLL PERIOD

We all agree with the judge that the January 5, 1999 change in the payroll period was an effect of the implementation of PeopleSoft, the corporatewide, computerized employee benefits system.[1] The same authorities my colleagues rely on to find that the Respondent was required to bargain over the effects of the implementation of the new printing system (Two Parts to the Field, or TPF) on terms of employment dictate that the Respondent was required to bargain over the change in the payroll period. To establish that a unilateral change was inextricably intertwined with a permissible preelection or managerial decision (and consequently not subject to notice and bargaining with the union) the Respondent had to show not only that the change was inextricably related to the implementation of PeopleSoft but also that no alternative change was possible. *Bridon Cordage*, 329 NLRB 258, 259 (1999). The Respondent's witnesses made no showing that the new payroll period had to run from Monday to Sunday, as opposed to some other week-long unit of time.[2] Nor has the Respondent even contended, let alone shown, that it was unable to give the Union advance notice of this change. See *Oklahoma Fixture Co.*, 314 NLRB 958, 961 fn. 7 (1994), affd. in relevant part 79 F.3d 1030 (10th Cir. 1996), and *Burk Enterprises*, 313 NLRB 1263, 1268 (1994), cited by my colleagues.

Nor do I agree with my colleagues that the Respondent's change in the payroll period was "ministerial" and de minimis because the record does not establish any actual impact on employees. It is established that a change in employees' payroll period is a material and substantial change in a term of employment, and a mandatory subject of bargaining. *Visiting Nurses Services*, 325 NLRB 1125, 1131 (1998), enfd. 177 F.3d 52 (1st Cir. 1999), cert. denied 528 U.S. 1074 (2000). Moreover, the record in this case shows that at least one unit employee was directly affected by this unilateral change. Indeed, the Respondent's direct dealing with that employee in order to resolve his particular concerns, which my colleagues find significant, further confirms that the Respondent violated its obligation to bargain with the Union over the payroll period change.

II. THE METHOD FOR ASSIGNING OVERTIME

My colleagues also find the Respondent's reduction of assigned "replacement" overtime (to cover absentee situations) to be de minimis because overtime in the aggregate subsequently increased and no unit employee

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] In the judge's view, the Respondent was required to bargain only over "the effects" of the change in the payroll period. However, the change in the payroll period itself was a bargainable "effect" of the implementation of the PeopleSoft benefit system.

[2] Had the Respondent shown that the new Monday - Sunday payroll period was specifically required by PeopleSoft on a corporatewide basis, the Respondent would not have had to show that its Fresno facility had a unique requirement for the new period. However, the Respondent's evidence on the need for corporatewide uniformity was not only conclusory, but failed even to address the need specifically for a Monday–Sunday period.

suffered a net loss of overtime. They do not contest the judge's factual findings that the amount of replacement overtime was reduced. Rather, they rely on evidence that other types of overtime increased during this period. However, the record does not foreclose the possibility that employees would have enjoyed an even larger increase in overtime had the unilateral reduction of replacement overtime not been made. (In other words, the record does not show that the reduction of replacement caused a corresponding increase in other types of overtime.) The change was therefore material and substantial, and a mandatory subject of bargaining. See *Ekstrom Electric*, 327 NLRB 339, 367 (1998); *Equitable Resources Exploration*, 307 NLRB 730, 733 (1992), enfd. mem. 989 F.2d 492 (4th Cir. 1993).

Furthermore, it is well established that even a change in a term of employment that is beneficial to employees is unlawful if the employer made the change unilaterally. *Carrier Corp.*, 319 NLRB 184, 193 (1995). In short, a showing that other types of overtime may have increased does not convert the Respondent's unlawful reduction of "replacement" overtime into a lawful action.

For these reasons, I would find that the Respondent's unilateral changes in the payroll period and in the assignment of overtime were not de minimis, and that the Respondent's refusal to bargain with the Union over those changes violated Section 8(a)(5) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change our existing practices regarding length of lunch periods; shift selection; double shifts; hours, days, and shift schedules of unit employees (including creating new shifts and changing shift starting times); and vacation relief, without giving prior notice to the Union and without affording the Union an opportunity to bargain with regard to such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time pressroom employees, including but not limited to, employees in the plateroom and utility workers, employed by Respondent in its Pressroom located at 1626 E. Street, Fresno, California facility; excluding all office clerical employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act, as amended, and all other employees, including but not limited to pre-press department employees, packaging center employees, and other production employees.

WE WILL, at the request of the Union, rescind the changes we made on March 1, 1999, regarding shift selection, double shifts, length of lunch periods, and shift schedules (including new shifts and new shift starting times).

WE WILL, at the request of the Union, rescind the changes made on May 17, 1999, rescinding the changes we made on March 1, 1999.

WE WILL make affected unit employees whole for any losses suffered by our failure to bargain over changing existing practices regarding shift selection; double shifts; employee hours, days, lunch periods, and shifts in their schedules; and vacation relief.

MCCLATCHY NEWSPAPERS, INC. D/B/A THE FRESNO BEE

Judith J. Chang, Esq., for the General Counsel.

Robert L. Ford, Esq., Raymond R. Kepner, Esq., and *Michael J. Burns, Esq. (Seyfarth Shaw Fairweather & Geraldson)*, of Los Angeles, San Francisco, and Sacramento, California, for the Respondent.

Victor Manrique, Esq., of Monrovia, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Fresno, California, on August 5 and 6, 1999.[1] The charge in Case 32–CA–17299 was filed by Graphic Communications International Union, Local 404, AFL–CIO (the Union) on March 9. The charge in Case 32–CA–17499 was filed by the Union on June 7. The cases were consolidated and complaint was issued May 19. At issue is whether McClatchy

[1] All dates are in 1999 unless otherwise indicated.

Newspapers, Inc. d/b/a The Fresno Bee (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act[2] by instituting changes in mandatory terms and conditions of employment without affording the Union an opportunity to bargain with respect to each change and the effects of each change.

The parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with offices and a place of business in Fresno, California, where it publishes and distributes a daily newspaper. In the 12-month period preceding May 19, 1999, Respondent derived gross revenues in excess of $200,000 and held membership in or subscribed to various interstate news services, published nationally syndicated features, and advertised nationally sold products. Respondent admits and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The parties stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act. I find, accordingly, that this is so.

III. UNFAIR LABOR PRACTICE ALLEGATIONS

A. Exclusive Representative Status

On August 17, 1998, the Union was certified as the exclusive collective-bargaining representative of the employees in the following unit which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time pressroom employees, including but not limited to, employees in the plateroom and utility workers, employed by Respondent in its Pressroom located at 1626 E. Street, Fresno, California facility; excluding all office clerical employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act, as amended, and all other employees, including, but not limited to, pre-press department employees, packaging center employees, and other production employees.

At all times since August 17, 1998, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of the unit employees for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. Allegations

The consolidated complaint, as amended at the hearing, alleges that Respondent made unilateral changes in mandatory terms and conditions of employment in 6 respects:

> 1. Assignment of overtime to replace absent employees (replacement overtime) was eliminated on or about January 5;
>
> 2. The payroll period ending date was changed from Saturday to Sunday on or about January 5;
>
> 3. Lunch periods were increased from 30 minutes to an hour on or about March 1.
>
> 4. Shift schedules were altered on or about March 1 and May 17;
>
> 5. Assignment of double shifts (two shifts in a 24-hour period, referred to as "Doubles") was eliminated on or about March 1;
>
> 6. The vacation relief shift was eliminated on or about May 17.

C. Background

At about the same time the Union was certified, management of the pressroom changed. Dennis Lyall, pressroom manager until August 1998, became manager of quality control, and thereafter the pressroom was managed by a series of short-term managers including Paul Marvin, assistant pressroom manager, Jerry Carlson, night coordinator, and finally, Fred Van Der Meulen, who served from November 1998 to May 1999. Since Van Der Meulen's departure, the pressroom has been run by a management committee including Production Manager Janet Owen, as well as Lyall, Marvin, and Carlson.

Following its certification and prior to the parties' first bargaining session in October 1998, the Union wrote to Respondent advising that any unilateral changes made to pressroom employees' terms and conditions of employment would constitute unfair labor practices. Nevertheless, in late January 1999,[4] after three bargaining sessions,[5] the Union heard from employees that Respondent was holding meetings with unit employees regarding changes in their working conditions, specifically changes in lunch periods, hours, and breaks, referred to as "possible new markup schedules." The Union confronted Respondent with this information at the next bargaining session, held on February 9, contending that the proposed changes were mandatory bargaining items. Respondent denied that there was an obligation to bargain but nevertheless "discussed" the matters with the Union at that session. This meeting concluded with the Union's request for information regarding proposed changes on new "markups" and other plans. Neither overtime

[2] Sec. 8(a)(1) generally prohibits employers from interfering with, restraining, or coercing employees in their exercise of the right to, among other things, bargain collectively through representatives of their own choosing. Sec. 8(a)(5) provides that it is an unfair labor practice for an employer, "to refuse to bargain collectively with the representatives of his employees."

[3] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[4] All dates hereafter are in 1999 unless otherwise specified.

[5] There was no bargaining session in January. The three bargaining sessions referred to were held in October through December 1998.

nor payroll period ending dates, the changes which occurred on January 5, were discussed at this meeting.

On March 1, Respondent completed implementation of "Two Parts to the Field," a quicker and more efficient method of printing than previously utilized. Prior to implementation, in 1996, Respondent began studying the methods by which it might be more efficient and timely. In 1997, Respondent implemented "Two Parts to the Field" printing on Fridays. In the spring of 1998, Respondent's publisher approved extending "Two Parts to the Field" to the entire operation. As a result of full implementation on March 1, the pressroom schedule was altered by increasing in the lunch period and shift changes. At the following bargaining session, held on March 11, the February 9 information request was discussed further. The Union told Respondent that it considered changes to payroll period and overtime mandatory subjects of bargaining. Respondent disagreed. There was no discussion of anticipated product changes or "Two Parts to the Field" at this session.

D. Overtime

From the employees' standpoint, prior to January 5, overtime was generally available when employees were absent ("replacement overtime"), and when additional staffing was needed to issue the newspaper on time ("piecemeal overtime"). From Respondent's viewpoint, overtime has always been assigned on an "as needed" basis. In any event, in early January, Production Manager Van Der Meulen was advised by Production Director Janet Owen that he needed to look more closely at operational needs before authorizing overtime.[6] Thereafter, employees noticed that "replacement overtime" was not utilized "a lot of times" when other employees were absent. Nevertheless, employees experienced an increase in their overtime pay during 1999 due to an increase in "piecemeal overtime."

E. Payroll Period

Prior to January 5, payroll periods began on Sunday and ended on Saturday. On January 5, Respondent changed its financial reporting and accounting by implementing a corporate-wide payroll program known as PeopleSoft. The decision to implement this program was made in August 1997, by Respondent's parent company, McClatchy, in order to insure uniformity in its 25 newspapers and to avoid Y2K problems. Pursuant to PeopleSoft, the payroll period was altered to begin on Monday and end on Sunday. This change impacted at least two employees' scheduled vacations. Their 1999 vacations were scheduled in 1998 for specific payroll periods. With the change in payroll periods, the flow of the vacations was interrupted requiring that they come back and work on Sunday. Respondent remedied this problem when the employees brought it to their attention.

F. Lunch Period

There is no dispute that on March 1, Respondent increased the length of the lunch period from 30 minutes to 1 hour. However, lunch period times have always fluctuated based on operational needs, both before and after March 1. In any event, the change in the length of lunch period was necessary to accommodate the additional time required to reconfigure the press for the second run pursuant to "Two Parts to the Field." The decision to utilize "Two Parts to the Field" was made in the spring of 1998.

G. Shift Schedules

Prior to March 1, employees chose their schedules by seniority on a weekly basis. From March 1 to May 17, Respondent utilized the same weekly shifts without change. On May 17, Respondent restored the pre-March 1 method of shift schedule selection.

On March 1,. Respondent began requiring employees to work a new "second" shift at 9 p.m. The reason for institution of a the new "second" shift was to complete change over from one edition to another, use additional equipment, and reconfigure the press. This change was necessary due to implementation of "Two Parts to the Field."

H. Doubles

Respondent's scheduling practice, prior to March 1, involved use of double shifts on occasion. A double shift is two shifts worked within a 24-hour period. Employees were allowed to select double shifts voluntarily based on seniority. If the "doubles" were not selected in this manner, Respondent assigned the double shift to the least senior employee. On March 1, Pressroom Manager Van Der Meulen took over pressroom management and eliminated this practice. On May 17, the practice of "doubles" was reinstituted, according to Respondent. However, only two employees were affected by the reinstitution.

I. Vacation Relief Shift

On March 1, Respondent instituted a vacation relief shift. Less senior employees were assigned to fill in for employees on vacation as vacation relief. On May 17, this practice was eliminated.

J. Contentions

Counsel for the General Counsel contends that all changes at issue herein involve mandatory subjects of bargaining and are material to working conditions. Initially, counsel asserts that there is little factual dispute regarding Respondent's prior terms and conditions with regard to many of the changes. For instance, she notes that prior to January 3, overtime was routinely available to cover absent employees and to offer lunch relief. Further, she notes there is no dispute that length of the lunch period prior to March 1 was 30 minutes, that double shifts were available, and that there were no vacation relief shifts. Relying on *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997), counsel asserts that all of these matters are mandatory subjects of bargaining. Counsel next argues that by changing these

[6] One of the employees found a memorandum from Van Der Meulen to Assistant Supervisors Paul Marvin and Jack Wink on the pressroom table where other literature is sometimes left. Although Respondent objected that this memorandum was not properly authenticated, the memorandum was nevertheless admitted as a document found by the witness on the pressroom table. Respondent also admitted that the document was in its files. The memorandum states that overtime expense in the pressroom has increased dramatically. As a result, the memorandum continues, "we will no longer be replacing absences with an overtime shift."

mandatory terms of employment, Respondent materially, substantially, and significantly affected employees' terms and conditions of employment.

Anticipating Respondent's defenses, counsel for the General Counsel argues that the Union did not waive bargaining because it was confronted with a fait accompli and, in any event, never specifically, clearly, and unambiguously waived bargaining. Counsel also contends that Respondent was not privileged to implement unilateral changes pursuant to initiating "PeopleSoft" and "Two Parts to the Field," because neither represented a change in the scope and direction of its business. Finally, counsel anticipates that Respondent will raise economic exigencies as a defense. Counsel contends that this defense must also fail because there is no proof of a business emergency which necessitated swift action.

Counsel for the Charging Party, noting that there was no impasse in negotiations, aruges that Respondent's duty to bargain included a duty to refrain from implementing any changes in mandatory terms and conditions of employment absent an overall bargaining impasse. Counsel contends that there was never any notice given the Union about any of the proposed changes nor was there ever an opportunity to bargain about any of the changes. Counsel also notes that Respondent's defense of implementing "Two Parts to the Field" to enhance competitiveness does not relieve Respondent of its duty to bargain because there was no emergency nor was there another local daily paper in the area.

Respondent concedes that changes were made. However, Respondent contends that many of these changes are inextricably intertwined with its pre-certification decision to implement "Two Parts to the Field" as a method of producing the newspaper and its precertification decision to adopt the PeopleSoft payroll program on a corporate-wide basis. Because Respondent views the "Two Parts to the Field" decision as a product-oriented, core management prerogative, Respondent urges that there was no duty to bargain with regard to the resultant increase in the length of lunch periods, change in shift schedules, and elimination of "doubles." Alternatively, Respondent suggests that schedule changes, availability of doubles, and lunch period fluctuations were the rule—not the exception—both before and after the Union was certified. Accordingly, Respondent argues that the March 1 schedule and hour changes were routine, consistent with its past practice and, therefore, not violative.

Respondent agrees that its decision to adopt PeopleSoft necessitated moving payroll period beginning and ending dates. However, Respondent claims that this decision was made long before certification, was a corporate-wide decision implemented to achieve payroll uniformity, was also implemented to preclude Y2K complications, and, in any event, did not impact employees adversely. Respondent contends that implementation of PeopleSoft was a legitimate entrepreneurial decision.

Finally, as to the May schedule changes and discontinuance of vacation relief, Respondent notes that these changes restored the status quo as of the date of certification. Accordingly, even if Pressroom Manager Van Der Meulen unlawfully implemented schedule changes and vacation relief on March 1, when he took over the pressroom, when Van Der Meulen left on May 17, the committee running the pressroom restored the status quo as of the date of the Union's certification. Respondent also notes that the Union learned of these changes on March 1, but never requested to bargain over either of the items.

K. Analytical Framework

Generally, refusal to negotiate regarding wages, hours, and other terms and conditions of employment (mandatory subjects of bargaining) about which the union seeks to negotiate violates Section 8(a)(5).[7]

> A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions," but also injures the process of collective bargaining itself. "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."

NLRB v. McClatchy Newspapers, 964 F.2d 1153, 1163 (D.C. Cir. 1992) (citation omitted). Accordingly, absent waiver by the union, an employer may not alter mandatory terms and conditions of employment until good-faith bargaining results in an impasse.[8]

Generally, operating procedure changes which have a significant effect on employees are mandatory subjects of bargaining.[9] On the other hand, bargaining regarding a decision involving a change in the scope and direction of the business which has a substantial impact on the continued availability of employment is, "required only if the benefit for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."[10]

Nevertheless, in some circumstances, a union may waive its right to bargain. This occurs when a union has clear notice,[11] prior to implementation, of the employer's intent to alter terms and conditions of employment.[12] In order to be timely, such notice must allow a reasonable opportunity to bargain.[13] If the

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[7] *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[8] *Frontier Hotel & Casino*, 309 NLRB 761 (1992), enfd. sub nom. *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995).

[9] See, e.g., *Columbia Tribune Publishing Co.*, 201 NLRB 538 (1973), enfd. 495 F.2d 1384 (8th Cir. 1974) (change from "hot-type" to an automated "cold-type" process resulting in layoff of half bargaining unit was mandatory subject of bargaining).

[10] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1980).

[11] Ambiguous statements, such as the employer is "considering" a specified change, do not give rise to the union's duty to act with due diligence to preserve a bargaining request. *Oklahoma Fixture Co.*, 314 NLRB 958 (1994), enfd. denied 79 F.3d 1030 (10th Cir. 1996). See also *Porta-King Building Systems v. NLRB*, 14 F.3d 1258, 1262–1263 (8th Cir. 1994) (mere suspicion or conjecture cannot take the place of notice; plant gossip and rumor also fail as substitutes for formal notice), enfg. 310 NLRB 538 (1993).

[12] See, e.g., *Alltel Kentucky, Inc.*, 326 NLRB 1350, 1350–1351 (1998): "Having been notified of the [employer's] decision to grant no wage increase, it was incumbent upon the Union to request bargaining over that decision."

[13] See *Reynolds Metal Co.*, 310 NLRB 995 (1993); cf. *YHA Inc. v. NLRB*, 2 F.3d 168 (6th Cir. 1993), denying enf. 307 NLRB 782 (1992).

union does not respond to an employer's timely notice, waiver may occur.[14] Under these circumstances, the employer bears the burden to show that the union clearly and unmistakably waived its right to bargain.[15]

When the parties are engaged in ongoing negotiations, as here, the employer is obligated to refrain from making any unilateral changes until an overall impasse occurs in bargaining.[16] However, when excused by a serious business emergency which requires prompt action during ongoing negotiations, unilateral implementation of changes may be lawful.[17]

Finally, in order for a violation to be found, the unilateral change must materially, substantially, and significantly affect employees' terms and conditions of employment.[18] For instance, in *Ironton Publications*, 321 NLRB 1048 (1996), the Board found the employer's unilateral removal of camera work from pressroom employees, which had no significant impact on pressroom employees, was not a material, substantial change in the work of pressroom employees. 321 NLRB 1048 fn. 2.

L. Analysis

Each of the alleged unilateral changes involves a mandatory subject of bargaining.[19] All of the changes were implemented following certification of the Union and following several bargaining sessions between the parties. Although final agreement had not yet been achieved by the negotiators, there is no claim of impasse in the negotiations. I find in agreement with the General Counsel and the Charging Party that none of the changes was the subject of appropriate notice to the Union, none of the changes was bargained with the Union, and the Union did not waive its right to bargain regarding any of these matters. Given these circumstances, Respondent's defenses must be examined in order to determine whether a violation of the Act has occurred.

Overtime: I find that Respondent's policy regarding assignment of overtime was altered in early January to curtail use of "replacement" overtime. I further find, contrary to Respondent's assertion, that this change materially altered the employees' terms and conditions of employment. Respondent argues that because, on the whole, overtime increased for pressroom employees, there was no material change in their working conditions. This argument is akin to an argument that a unilateral wage increase does not alter working conditions and, similarly, must fail. Moreover, the record does not support a conclusion that elimination of replacement overtime was an isolated matter. Rather, the record indicates that replacement overtime was eliminated for the most part. Accordingly, I find that Respondent was obliged to provide the Union with notice and an opportunity to bargain regarding this decision and the effect of this decision on its unit employees.

Payroll Period: Respondent implemented the PeopleSoft change in its payroll period starting and ending dates without notifying the Union.[20] Employees' vacation schedules had to be adjusted after the change was implemented. Such an impact is material to the employees' terms and conditions of employment. Although Respondent was privileged to make its preelection decision regarding PeopleSoft without consulting the Union, it was not free to implement this decision after the Union was certified until it consulted with the Union regarding the effects of its decision. As Respondent had long been aware of the upcoming changes attendant to implementation of PeopleSoft, when it began bargaining with the Union in October 1998, there was every reason to make the Union aware of implementation of PeopleSoft as soon as possible. Accordingly, I find that Respondent violated its duty to bargain in good faith by failing to afford the Union an opportunity to bargain regarding the effects on unit employees of implementation of PeopleSoft.

Lunch Schedules and Second Shift: These changes were incidental to implementation of "Two Parts to the Field." Respondent asserts that it was privileged to institute these changes unilaterally because they were inextricably intertwined with "Two Parts to the Field": representing exercise of its entrepreneurial discretion regarding the scope and direction of the business. I find this characterization inflates the institutional importance of "Two Parts to the Field." Implementation of "Two Parts to the Field" represented an operational change, not a change in the scope and direction of the enterprise.[21] Given that Respondent made the decision to implement "Two Parts to the Field" prior to the representation election, it was privileged to make it without bargaining with the Union.[22] However, it

[14] *Kansas National Education Assn.*, 275 NLRB 638 (1985).

[15] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[16] *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[17] *Bottom Line Enterprises*, supra at 374; see also *RBE Electronics of South Dakota*, 320 NLRB 80, 82 (1995) (recognizing an abbreviated bargaining obligation for time-sensitive exigencies which the employer is either compelled to make or which were reasonably unforeseeable); *Vincent Industrial Plastics*, 328 NLRB 300, 300–301 (1999).

[18] In *Mitchellace, Inc.*, 321 NLRB 191, 193 fn. 6 (1996), Administrative Law Judge Stephen J. Gross set forth an exhaustive catalogue of Board precedent on this issue.

[19] See, e.g., *Equitable Resources Energy Co.*, 307 NLRB 730, 733 (1992), enfd. 989 F.2d 492 (4th Cir. 1993) (assignment of overtime); *Fall River Savings Bank*, 260 NLRB 911, 914 (1982) (assignment of overtime); *Visiting Nurse Services of Western Massachusetts*, 325 NLRB 1125, 1131 (1998) (payroll period); *Pepsi-Cola Bottling Co.*, 315 NLRB 882, 895, 901 (1994), enfd. 96 F.3d 1439 (4th Cir. 1996) (lunch period; shift schedules); see also *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997), relied upon by counsel for the General Counsel (work hours, work assignments, access to accounting office, elimination of breaks, stricter enforcement of attendance policy, wage increases, Christmas bonus).

[20] Such change indicates an intent to make the change without consulting the Union. *S & I Transportation, Inc.*, 311 NLRB 1388 fn. 1 (1993).

[21] See, e.g., *Leach Corp.*, 312 NLRB 990, 995 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995) (change from batch system to "just-in-time" did not involved fundamental change in manufacturing process but was change in process resulting from advancing technology).

[22] See *Howard Plating Industries*, 230 NLRB 178, 179 (1977) (obligation to bargain is established as of date of election); *Fast Food Merchandisers*, 291 NLRB 897, 900 (1988) (obligation to effects bargain regarding pre-election decision); see also *Sivalls, Inc.*, 307 NLRB 986, 987 (1992), relied upon by Respondent (company decided to utilize specific drug testing laboratory well before existence of bargaining obligation and was not obligated to bargain with union regarding that decision).

was incumbent upon Respondent to provide notice to the Union regarding implementation of its decision and to afford the Union an opportunity to bargain regarding the effects of implementation of "Two Parts to the Field" on the bargaining unit.[23]

Shift Selection and Elimination of Doubles: These changes, although made on March 1, were not incidental to the decision to implement two parts to the field. The method of shift selection was arbitrarily changed by Van der Muelen without notice to the Union or opportunity to bargain regarding the decision or the effects of the decision. Similarly, doubles were eliminated by Van der Muelen because he felt this practice posed a safety problem. Doubles were eliminated without notice to the Union or opportunity to bargain regarding the decision or the effects of the decision.

Vacation Relief: Van Der Meulen implemented a vacation relief schedule on March 1.[24] When Van Der Meulen left the pressroom on May 17, the vacation relief schedule was eliminated. Respondent contends that it did not have to bargain about this change based on its prior practice of retaining full operating flexibility. I reject Respondent's prior bargaining history and past practices as a nonunion employer as a defense.[25] Further, elimination of vacation relief represented more than mere scheduling. Vacation relief was an across-the-board practice applied to all employees during the period from March 1 to May 17. The fact that the preelection status quo has now been restored does not constitute a defense to the violation.[26] Moreover, the Union did not waive its right to bargain about elimination of vacation relief when it failed to raise the issue at the bargaining table. The Union learned of elimination of vacation relief through employees in the bargaining unit. Implementation was a fait accompli at that time. Accordingly, it was not incumbent upon the Union to request bargaining and failure to request bargaining did not constitute a waiver.[27] I find that by eliminating vacation relief without notice to the Union or affording it an opportunity to bargain, Respondent violated its duty to bargain in good faith.

Further Schedule Changes: On May 17, the March 1 scheduling procedures were rescinded and Respondent reverted to its prior method of scheduling employees. I find that ~~Respondent violated its duty to barg~~ain in good faith by dent violated its duty to bargain in good faith by changing the method of scheduling without consulting with the Union.

[23] *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995), relying on *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981).

[24] Implementation of vacation relief is not alleged as a violation.

[25] See, e.g., *Amsterdam Printing & Litho Corp.*, 223 NLRB 370 (1976), enfd. 559 F.2d 188 (D.C. Cir. 1977).

[26] *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978).

[27] *A K Steel Corp.*, 324 NLRB 173, 181 (1997).

CONCLUSIONS OF LAW

1. By changing the working conditions of its unit employees regarding overtime assignment; shift selection, doubles, hours, days, and shifts in the schedules of unit employees; and vacation relief without prior notice to the Union and without affording the Union an opportunity to bargain with regard to the changes and the effects of each change, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. In connection with implementation of "Two Parts to the Field," by changing the length of lunch periods and changing shift schedules, and in connection with implementation of PeopleSoft, by changing payroll period starting and ending dates, without affording the Union an opportunity to bargain with regard to the effects of these changes, Respondent violated Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent must restore the status quo by rescinding unilateral changes made without affording the Union an opportunity to bargain regarding the decision to institute these changes or the effects of institution of these changes. This portion of the remedy includes changes made to overtime assignment, shift selection, doubles, hours, days and shifts of employees' schedules, and elimination of vacation relief. Respondent must make whole its unit employees for any losses incurred by them as a result of these changes in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). With regard to Respondent's failure to bargain over the effects of implementation of PeopleSoft and "Two Parts to the Field," Respondent must bargain with the Union regarding the effects of implementation of PeopleSoft and "Two Parts to the Field." Any losses suffered by employees as a result of Respondent's failure to bargain regarding the effects of implementation of these programs shall be computed in a manner analogous to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

[Recommended Order omitted from publication.]